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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6390

DATE COMPLAINT FILED: October 4, 2010

DATE OF NOTIFICATION: October 8, 2011

LAST RESPONSE RECEIVED:

DATE ACTIVATED: January 12, 2011

EXPIRATION OF BOL: Earliest Nov. 4, 2013
Latest Nov. 2, 2015

COMPLAINANT:

Erin Hill/ActBlne

RESPONDENT:

Senate Conservatives Fund and Barry Wynn, in his
official capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 434(b)

2 U.S.C. § 441a

11 C.F.R. § 110.6(d)

INTERNAL REPORTS CHECKED:

none

FEDERAL AGENCIES CHECKED:

none

I. INTRODUCTION

The complaint in this matter alleges that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, ("SCF") made excessive contributions to ten different Senate candidates when it exercised direction and control over earmarked contributions that it had solicited. The complaint alleges that SCF's exercise of direction and control over the subject contributions made the contributions dually attributable to both the original individual contributors and to SCF as the conduit. Specifically, complainant states that SCF's use of an "easy button" on its webpage, which unequally apportioned a contribution among the available candidates, prevented contributors from choosing which candidates to support or the level of

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1 support; instead, these decisions were allegedly left to SCF. Insofar as SCF acted as a conduit
2 for more than \$3 million in contributions during the 2010 election cycle, SCF allegedly violated
3 2 U.S.C. § 441a(a) by making excessive contributions to these ten candidates. The attribution of
4 these "easy button" contributions to SCF would also result in SCF violating 2 U.S.C. § 434(b) by
5 failing to report those contributions.

6 SCF responds that the "easy button" only suggested a possible division of the
7 contribution at the contributor's request, and the contribution system then required the donor
8 either to edit the suggested contribution amounts or accept the suggested division before
9 completing the contribution process. Therefore, SCF states that these controls in the "easy
10 button" contribution allocation system prevented its exercise of improper direction or control
11 over contributions.

12 A review of the information provided regarding how the SCF contribution system worked
13 indicates that choosing to use the "easy button" did not result in SCF exercising direction or
14 control over contributions. We recommend that the Commission find no reason to believe that
15 SCF violated the Federal Election Campaign Act of 1971, as amended ("the Act").

16 **II. FACTUAL BACKGROUND**

17 South Carolina Senator Jim DeMint established the Senate Conservatives Fund as a
18 "political action committee dedicated to electing strong conservatives to the United States
19 Senate." See the SCF website, (<http://senateconservatives.com/site/about>, last visited February
20 24, 2011.) For the 2010 election cycle, SCF encouraged earmarked contributions to ten Senate
21 candidates. See Complaint Attachment 1, a screenshot of the front page of the contributions
22 portion of the SCF website.

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1 The SCF website appears to have been a major source of the organization's fundraising.
2 The website's contributions page displayed photos of the ten candidates along with text
3 indicating the Senate race involved and a blank box for entering contribution amounts. *See*
4 Complaint Attachment 1. A contributor could elect to contribute to the ten candidates in one of
5 two ways. A contributor could enter his/her own contribution amounts for some or all of the
6 SCF-supported candidates by typing amounts in the provided boxes. Alternatively, the
7 contributor could enter a single desired contribution amount into a separate box and click an
8 "easy button" that would make an automatic suggested apportionment of the contribution. SCF's
9 response stated that the "easy button's" apportionment among the ten candidates "achieve[d]
10 maximum impact based on recent polling, candidate fundraising, and other factors." Response at
11 ¶ 2. If a contributor selected the "easy button" option, the website proposed unequal contribution
12 amounts in the boxes next to the candidates, depending on the candidates' needs, likelihood of
13 winning, etc. It appears that choosing the "easy button" allocated at least some of the
14 contribution to each of the ten candidates. *See* Response Attachment 1, a screenshot of a
15 potential "easy button" allocation (in which every candidate was allocated at least \$1 of a \$100
16 contribution).

17 The complainant alleges, "upon information and belief," that contributors using the "easy
18 button" do not see or cannot control the apportionment of their contributions. Complaint at 1.
19 However, the response states that "the website ... allows the donor to edit the suggested
20 division..." Response at ¶ 3. A button at the bottom of the initial contribution screen invited
21 contributors to "Complete Your Contribution." *See* Response Attachment 1. Clicking that
22 button took contributors to the next page in the process, on which the photos of the candidates
23 and the allocated contribution amounts for each were again displayed, and on which the

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1 contributor entered name, contact information, and credit card information. *See* Response
2 Attachment 2, a screenshot of the contribution information page. The response states that
3 contributors could edit the amounts contributed to each candidate on this second page as well.
4 *See* Response at ¶ 3. The second page also invited the contributor to give an extra contribution
5 to SCF to "cover our costs and elect more conservatives," and included a donor agreement
6 confirming that the funds were federally permissible funds. *See* Response Attachment 2. The
7 bottom of the screenshot of the second page is cut off in Attachment 2, but it appears that
8 confirming the donor agreement moved the contributor to the third page in the contribution
9 process. *See* Response Attachment 3, a screenshot of the contribution completion page. The
10 page provided at Attachment 3 displayed all the information the contributor entered, including
11 the total contribution, contributions by candidate, credit card information and contact
12 information. This page included a "Complete Your Donation" button, underneath which is a link
13 asking "See a mistake? Click here to make changes." *See id.* Clicking the Complete Your
14 Donation button generated an e-mailed receipt, which detailed the contribution given to each
15 candidate. *See* Response Attachment 4.

16 SCF's response states that "[t]he website ["easy button"] shows the donor how his/her
17 contribution *could* be divided and allows the donor to edit the suggested division on not just the
18 first page of the site, but also on the second page where the donor enters his/her personal
19 information. The "easy button" is used to inform contributors as to which candidates have the
20 greatest need, but it does not force them to do anything; *and all donations are fully disclosed and*
21 *capable of being edited and allocated however the donor chooses to do so.*" Response at ¶ 3,
22 (emphasis in original). The response also included an affidavit from an SCF contributor and
23 "easy button" user, Don Workman, who stated that he "appreciate[s] this ["easy button"] feature

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1 that allows me to decide the total amount I wish to contribute and then allows me to either divide
2 equally the contributions to each candidate, allocate according to my own formula, or contribute
3 to candidates based on a suggested allocation. ... [T]his feature ... allows me to make
4 contributions to several candidates in a much more convenient manner." See Response
5 Attachment 5 at ¶¶ 4 and 5.

6 **III. LEGAL ANALYSIS**

7 No multi-candidate PAC may contribute more than \$5,000 to any candidate and his or
8 her authorized political committee with respect to any election for federal office. 2 U.S.C.
9 §§ 441a(a)(2)(A). Any political committee other than an authorized committee must report all
10 expenditures, including contributions made to other political committees. 2 U.S.C.
11 § 434(b)(4)(H)(i). "A conduit's or intermediary's contribution limits are not affected by the
12 forwarding of an earmarked contribution except where the conduit or intermediary exercises any
13 direction or control over the choice of the recipient candidate." 11 C.F.R. § 110.6(d)(1).
14 Further, if the conduit does exercise direction or control over the choice of the recipient
15 candidate, the contribution is considered a contribution from both the original contributor and the
16 conduit, with the entire contribution amount attributed to each. 11 C.F.R. § 110.6(d)(2).

17 The term "direction or control" has not been specifically defined by the Commission.
18 See *FEC v. NRSC*, 966 F.2d 1471, 1477-1478 (D.C. Cir. 1992) ("[t]he Commission's precedents
19 and statements, ... do not clearly establish what 'direction or control,' for purposes of the
20 regulation [110.6(d)(1)], means.") Instead, it appears that the Commission has taken a case-by-
21 case approach in applying the "direction or control" test. In AO 1980-46 (National Conservative
22 PAC) ("NCPAC"), the Commission considered a PAC's plan to conduct a mass mailing
23 soliciting earmarked contributions to a specific candidate, which contributions were to be sent to

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1 NCPAC, bundled by NCPAC, and then delivered to the candidate's committee. The
2 Commission cited several factors that led it to conclude that NCPAC did not exercise direction
3 or control over the earmarked contributions flowing from its solicitation, including: 1) the
4 contributor, not NCPAC, made the choice whether to contribute to the specified candidate, 2) the
5 potential contributor could decide not to contribute, 3) NCPAC did not have any significant
6 control over the timing of contributions, 4) NCPAC did not have control over the amount of the
7 contribution, and 5) NCPAC did not have control over the intended recipient of the contribution
8 because the contributions were solicited as checks made out to the candidate's committee. See
9 AO 1980-46 (NCPAC) at 3.

10 The Commission applied similar factors in AO 1986-4 (Armstrong Industries) and
11 advised that the requestor would be exercising direction and control. The Commission
12 determined that a corporate plan to make political contributions by setting a corporate
13 contribution goal for a candidate, having an Armstrong employee request funds from executives
14 until the goal was met, and then having the Washington corporate office transmit the
15 contribution to the candidate's committee in conjunction with a fundraising event would exercise
16 direction or control over the contributions and required reporting of any contributions as coming
17 from the original contributor and from Armstrong. The Commission stated

18 Armstrong will determine whether a contribution should be made, what the
19 aggregate amount of the contribution should be, and whether a company
20 representative should attend. It will then have the administrator canvass
21 Armstrong's executives until the desired aggregate contribution is reached. The
22 administrator will collect these contribution checks, made payable to the
23 candidate's committee, and transmit them to Armstrong's Washington office
24 which will further deliver these contributions to the candidate or the candidate's
25 committee in connection with Armstrong's participation in the fundraising event.
26 Armstrong, not the contributor, will determine the recipient of a contribution, its
27 aggregate amount, and its timing. Compare Advisory Opinion 1980-46. Thus,
28 notwithstanding the representation in your request, Armstrong will, in the totality

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of these circumstances, exercise direction and control over the making of such earmarked contributions as well as act as the conduit and intermediary for them.

Applying these factors to the present matter indicates that SCF's use of the fundraising "easy button" did not amount to the exercise of discretion or control over contributions as contemplated by 11 C.F.R. § 110.6(d)(1). The information provided by SCF indicates that the potential contributor could choose to contribute or not, could choose the timing and amount of any contribution, and could choose to which of SCF's recommended candidates he/she desired to contribute or to simply make a contribution to SCF for its operating expenses. Regarding the "easy button," the information provided indicates that choosing to push the "easy button" provided the contributor with a suggested apportionment of the contribution. However, the contributor could then choose to accept the suggested allocations, change the allocations, or make contributions only to some of the candidates supported by SCF while not contributing to others.

The contributor had full knowledge of how the "easy button" apportioned the contribution, and the website offered the contributor multiple opportunities to review and/or alter the suggested contribution amounts. SCF only processed and distributed contributions after the contributor confirmed the "easy button" choices or made wanted changes. See Response at ¶ 5 and Attachments 1-4. Based on the information in the response, including the screen shots and the affidavit from Don Workman, an SCF "easy button" user, it appears that the "easy button" system did not give SCF "direction or control" over contributions.

Accordingly, we recommend that the Commission find no reason to believe that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b) by exercising direction or control over contributors' contributions and failing to report the resulting contributions.

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IV. RECOMMENDATIONS

1. Find no reason to believe that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a);
2. Find no reason to believe that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. § 434(b);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and
5. Close the file.

Kathleen Guith
Acting Associate General Counsel

4/6/11
Date

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